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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JUDIE WILSON, Plaintiff and Respondent, v. DON DAO, Defendant and Appellant.	A094250 (San Francisco County Super. Ct. No. 318956)

Appellant, Don Dao, who appears in propria persona, challenges an order granting a preliminary injunction prohibiting him from harassing respondent, Judie Wilson. (Code Civ. Proc., § 527.6)[1] We shall affirm the judgment and grant respondent's motion for sanctions for failure to prepare an adequate record. (Cal. Rules of Court, rule 26(e).)

FACTS AND PROCEEDINGS BELOW

Respondent is employed as a banquet supervisor at the Palace Hotel in San Francisco. On February 16, 2001,[2] she filed an application for an order to show cause and temporary restraining order in the San Francisco Superior Court. In a declaration attached to the application, respondent stated that during a period of about nine months, appellant showed up at numerous corporate sponsored luncheons conferences and

1 All statutory references are to the Code of Civil Procedure.

2 All dates refer to that year unless otherwise indicated.

receptions at the hotel to which he had not been invited, claiming to be a member of the press. During these events, she declared, appellant "behave[d] in an increasingly aggressive manner toward me, other Hotel employees and guests." For example, at several events in May 2000 sponsored by IDG Infoworld, appellant "walked behind me, stared at me with an angry expression, and asked me for my name. He also demanded that two other Hotel employees, a busser and a bartender, give him their names." At another IDG Infoworld event, appellant followed respondent around the hotel and, without provocation, stared at her "with an angry expression."

Finally, at a luncheon on February 7 sponsored by Sun Microsystems, respondent informed a hotel manager of appellant's presence. The manager asked appellant to step outside so that he could establish he was properly registered for the event. As appellant followed the manager to the registration desk he approached respondent "in a threatening and menacing manner," and accused her of making derogatory and racially discriminating remarks. After establishing appellant had not been invited to the Sun Microsystems event, security officer Michael Jawitz asked him to leave.

Five days later, at an evening reception sponsored by a foundation, appellant approached respondent and two other hotel employees with a camera and tried to take their picture. When they resisted he came within inches of respondent's face, ignoring her statements that she did not want her picture taken. Later that evening, and again without provocation, appellant approached respondent, angrily shook his finger in her face and again accused her of making discriminatory remarks about him, calling her "a stupid bitch." Because appellant "was acting in an extremely agitated and erratic manner," respondent feared he would strike her. Her declaration states that "[w]hen leaving the hotel to return home on the BART train in the evening, I have felt genuinely threatened and fearful that Mr. Dao may be waiting outside with the intent to cause me harm." Respondent tries to avoid appellant when she sees him at private events at the hotel "because his tendency toward erratic and abusive behavior . . . worries and upsets me." Respondent's declaration also states that events such as the ones appellant

frequently attended without invitation were scheduled for the period immediately after she filed her request for a restraining order, and that she will be working at those events.

On February 22, six days after respondent applied for a restraining order, appellant sought the same relief in the same court against respondent and other employees of the Palace Hotel. However, unlike respondent's application, which resulted not just in an order to show cause but also in the immediate issuance of a temporary restraining order, the presiding judge struck that portion of appellant's form request relating to a temporary restraining order, because he questioned appellant's "credibility," though he granted an order to show cause.

A hearing on the competing applications was held before Commissioner Loretta M. Norris on March 7.[3] Respondent was represented by counsel, appellant represented himself. In addition to the declarations and other written materials submitted to the court by the parties, the court heard the testimony of Michael Jawitz, one of respondent's co-workers. Jawitz testified that on at least three and possibly four occasions he was asked by sponsors of events at the hotel to remove appellant, either because he had not been invited or because of his conduct. For example, he testified that on February 7 representatives of Sun Microsystems, which was hosting a conference that day at the hotel, told Jawitz "we don't even know this guy" and "don't . . . want him attending this function." Jawitz asked appellant to leave and, after initially resisting, appellant finally left. Several days later, appellant attempted to register at a conference at the hotel sponsored by Robertson/Stevens, an investment company. Because it had not issued appellant a press credential, the company asked Jawitz to direct appellant to leave. He did so and appellant left. Two days later Jawitz was again summoned by representatives

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[3] At this hearing Commissioner Norris noted that a hearing on respondent's case had commenced a week earlier, "but I put that matter over for hearing when I learned that Mr. Dao had filed a petition against Ms. Wilson and five other employees of the Palace Hotel . . . ." The record before us contains no transcript of the earlier hearing, which was apparently held on March 2. We therefore assume no evidence was offered at that time and no ruling then made by the court.

of Robertson/Stevens who told him appellant had reappeared and was putting a tape recorder in the faces of people working at the registration table. Again Jawitz asked appellant to leave the premises. Appellant went to a bar in the hotel for a drink and subsequently left the hotel.

At the close of the hearing, Commissioner Norris denied appellant's request for an injunction and granted respondent's request. Appellant was ordered to stay at least 10 yards away from respondent as well as from her residence and the Palace Hotel, her place of work. The court accepted the truth of respondent's testimony and that of Jawitz and rejected appellant's contrary testimony. As stated by the court, "it's all a credibility issue. That's what this thing is all about, credibility."

The court's rejection of appellant's claim that he was a journalist asserting a First Amendment right was based in part on a declaration submitted by respondent's counsel, Seth L. Neulight. Neulight reminded the court that at an earlier hearing appellant testified he is editor of a publication called the California Business Review, which he claimed to distribute free of charge "to members of the indigent Asian-American community," and provided the court a copy of the publication which consisted of a piece of paper headed, in bold type, with the title "California Business Review" and consisting of a single article entitled "Intel Outlines Evolution of Next-Generation Wired and Wireless Networks" with the by-line "By Don Dao." Attorney Neulight's declaration goes on to state that he conducted an Internet search which revealed that appellant's "article" was no more than an almost verbatim copy of a press release issued by Intel over the Internet, a copy of which counsel also provided the court. The trial court was impressed with this evidence, which was the basis it gave for concluding: "I do not believe that you are a journalist, a legitimate journalist as you say with any press credentials."

DISCUSSION

Appellant's opening brief, which is barely coherent, boils down to three claims: (1) that the judgment is not supported by substantial evidence, (2) that the injunction, which prohibits constitutionally protected conduct, is impermissibly overbroad, and (3)

that it was error to issue the injunction without requiring an undertaking.[4] Before addressing these questions, there is a procedural matter that must first be dealt with, because it relates to our ability to evaluate the substantive issues presented.

I.

Appellant elected to proceed in this court under the provisions of rule 5.1 of the California Rules of Court, rather than rule 5; that is, he chose to use an appendix rather than a clerk's transcript. Rule 5.1 authorizes the filing of an "appellant's appendix" or a "joint appendix." Joint appendices are, however, favored. Thus subdivision (d) of rule 5.1 states that "[c]ounsel have a duty to confer and attempt to reach an agreement concerning a possible joint appendix." Respondent's counsel represent to this Court that after they learned appellant had elected to file an appellant's appendix they wrote him requesting discussions regarding the filing of a joint appendix. Appellant assertedly rejected such discussions. Instead, he filed an appellant's appendix that reveals almost complete indifference to subdivisions (b) and (c) of rule 5.1, which set forth detailed specifications as to the "contents" and the "arrangement and form" of an appellant's appendix. Among other things, appellant failed to include such "documents listed in subdivision (d) of rule 5 as are essential to the proper consideration of the issues, *including such documents as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised*." (Rule 5.1(b), italics added.) Appellant's appendix contains few of the pleadings filed by respondent, none of the evidence relied upon by respondent, and no transcript of the trial court hearings. While he includes many of his own pleadings, most are not file stamped or otherwise conformed to show when

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[4] Appellant identifies seven claims in his opening brief (at pp. 7-8), but most amount to no more than different ways of challenging the sufficiency or validity of the evidence. For example, in addition to asserting that there is no evidence of "unlawful violence" or "course of conduct" constituting harassment, appellant relies on a variety of equitable doctrines, including the "doctrine of balancing of conveniences," and the "doctrine of clean hands." He claims the injunction should be dissolved also because it does not "serve the ends of justice" and is "contrary to public interest" and "public policy."

they were filed below, as required by rule 5.1(c)(1), and we therefore have no assurance they were in effect the pleadings ruled upon by the court. As respondent points out, some of the documents included in appellant's appendix appear to be doctored copies of originals submitted at trial. Furthermore, the appendix contains a great deal of material relating to appellant's alleged status as a journalist that is not shown to have been offered to and received by the trial court. Finally, appellant's appendix is not paginated, as also required by rule 5.1(c)(1), which, together with the other defects, renders it almost useless.

Respondent argues that the judgment must be affirmed because the record provided by appellant is inadequate to conclude that the trial court erred. There is support for this contention. (See, e.g., *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 ["We reject defendants' claim . . . because they failed to provide this court with a record adequate to evaluate [their] contention."]; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) Nevertheless, because respondent has provided a reporter's transcript as well as other pertinent materials omitted from appellant's appendix, and because the law favors deciding cases on the merits, we elect to address the issues appellant has presented.

However, rule 5.1(i)(1) of the California Rules of Court provides, as material, that "[w]illful or grossly negligent filing of an appendix containing nonconforming copies is an unlawful interference with the proceedings of the reviewing court, and subjects the counsel filing the brief, and the party represented, to monetary and other appropriate sanctions." Subdivision (i)(2) of rule 5.1 states that "[i]f an appellant's appendix is so inadequate that justice cannot be done without requiring inclusion of documents in the respondent's appendix which should have been in the appellant's appendix . . . the court may impose monetary sanctions." In order to penalize appellant's unreasonable infraction of the rules governing appeals and to relieve respondent of the costs she was

required to incur to rectify those violations, we shall grant respondent's motion for sanctions pursuant to rule 5.1(i)(1)(2) and impose sanctions in the amount of $1,432.70 payable to respondent as the reasonable amount she expended in preparing a supplemental appendix.[5] (Cal. Rules of Court, rules 5.1(i) 26(a)(1); § 128(a)(3).) In deciding this appeal, we shall not take into account any evidence not shown to have been properly authenticated and received by the trial court.

II.

Appellant's chief contention is that the determination that he "harassed" respondent within the meaning of section 527.6 is unsupported by substantial evidence and must therefore be reversed. This issue is not a matter of law and our review is therefore not de novo, as appellant maintains.

The substantial evidence rule is among the most basic and familiar principles of appellate review. "When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, original italics; accord, *Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) So long as there is "substantial evidence," an appellate court must affirm, as it has no power to substitute its deduction for those of the trial court. (*Bowers v. Bernards, supra,* at 874.) Deference to a trial court determination is particularly warranted where, as here, it is based upon a credibility assessment, as the trial court had the benefit of observing the demeanor of witnesses and is therefore in a better position than an appellate court to evaluate credibility. (*Maslow v.*

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[5] The declaration of Deborah R. Schwartz, respondent's counsel, attached to the motion for sanctions, states that she spent 7.75 hours reviewing appellant's appendix, preparing respondent's appendix and drafting the motion for sanctions, that her customary rate is $170 per hour, and that the cost of copying respondent's appendix was $115.20. The court finds that the time Ms. Schwartz spent and her hourly rate are reasonable, as is the copying expense claimed.

Maslow (1953) 117 Cal.App.2d 237, 243.) In assessing whether substantial evidence supports the granting of an injunction under section 527.6 a reviewing court must therefore resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge all legitimate and reasonable inferences to uphold the finding of the trial court if supported by evidence that is reasonable, credible and of solid value. (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Subdivision (a) of section 527.6 provides that "[a] person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment . . . ." Subdivision (b) defines "harassment" as "unlawful violence, a credible threat of violence, or a knowing and willful course of conduct, directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff."

The evidence properly before us demonstrates a course of conduct constituting harassment. The events described in respondent's declaration and the testimony received in court show that appellant confronted respondent at her place of work, where he had no right to be, on numerous occasions, and that the confrontations were increasingly aggressive and would cause a reasonable person to fear for her physical safety and suffer significant emotional distress.

Appellant's defense consisted not so much of a denial of the conduct attributed to him by respondent as a claim that his conduct was justified as a reasonable response to her provocative harassment of him, which allegedly consisted of repeated racial slurs. Appellant maintained that respondent's efforts to have him ejected from the hotel was racially motivated, as shown by her reference to him as a "chink" and "a yellow slanted eyes animal." Appellant sought to justify his reaction to these epithets by claiming he was "in extremely frail health and . . . highly susceptible to severe physical and emotional distress from any form of physical or mental harassment." The trial court rejected these claims.

As to the alleged "terrible racial slurs by Ms. Wilson and several other members of the management [of the hotel]," the court stated "I don't find those allegations credible. . . . . He says [he was called] 'a chink,' 'a yellow slanted eyes animal.' I have never heard anybody use such language anywhere, and to suspect that management personnel of a major luxury hotel that is owned by an Asian corporation would, you know, engage in such conduct which is strictly against the law . . . just stretches my credibility, Mr. Dao. I just plain don't believe it." Stating the proposition a bit differently, the trial court concluded "I don't think you're being harassed. I think they're being harassed." The record provides no basis upon which we could gainsay this finding.

III.

As material, the injunction orders appellant not to contact, harass or otherwise disturb the peace of respondent and to stay at least 10 yards away from her and from her residence and place of work. Appellant's contention that the terms of the injunction are overbroad is based in large part on the claim he is a journalist prevented by the injunction from carrying out activities at the Palace Hotel protected by the First Amendment.

The trial court explicitly rejected appellant's assertion that he was a journalist, stating: "I do not believe that you are a journalist, a legitimate journalist as you say with any press credentials." In support of this conclusion, the court pointed to the evidence presented by respondent's counsel: "[Y]ou gave us a piece of paper last week as an example of the sorts of things you publish, which was simply a one page—it did not appear to be a publication. And counsel found the virtually identical information on the web site of the company that you were allegedly writing about." As the evidence supports the determination that appellant was not a journalist, his assertion that the injunction unnecessarily infringes his ability to carry out newsgathering responsibilities at the Palace Hotel is untenable. Moreover, the events at the Palace Hotel at which appellant was found to have harassed respondent were private, not public, events, and it is long-standing and constitutionally unchallenged policies of the hotel, not just the order, that prevent appellant from attending such private events.

Appellant claims that the injunction infringes the constitutional rights of free speech, assembly and "access to quasi-public forum" that he enjoys as a citizen, but he does not explain how it does so. Because it does not appear to us that an order prohibiting appellant from harassing respondent or coming closer than 10 yards to respondent, her residence or her place of work encumbers any constitutionally protected activity, we reject his contention that the injunction is impermissibly overbroad.

IV.

Appellant's final argument, that the injunction must be dissolved because "the order was entered without the necessary undertaking," appears to be based on section 529 which states in material part that "[o]n granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction."

We note, preliminarily, that conditioning injunctions sought under section 527.6 on the posting of an undertaking—which so far as we know has never been done—would undermine the purpose of the statute. Section 527.6 was enacted to protect the individual right to pursue safety, happiness and privacy as guaranteed by the California Constitution. (*Grant v. Clampitt* (1997) 56 Cal.App.4th 586, 591; *Kobey v. Morton* (1991) 228 Cal.App.3d 1055, 1059.) Among other things, the statute was designed "to provide expedited relief to harassment victims." (*Grant v. Clampitt*, *supra*, at p. 592.) If a harassment victim could not obtain an injunction to secure this relief except on the payment of an undertaking, this purpose would likely be thwarted, particularly with respect to impecunious victims, and a constitutional problem would be created. Clearly, the Legislature never intended to condition the benefit of section 527.6 on the ability of the victim to pay an undertaking. Not only does the statute impose no such financial requirement, but it expressly relieves certain applicants even of the need to pay a filing fee. (§ 527.6, subd. (o).)

Finally, the record before us does not show that appellant ever asked the trial court to require respondent to post an undertaking pursuant to section 529.[6] In short, the issue of an undertaking, which is raised for the first time on appeal, must be deemed to have been waived.

DISPOSITION

For the foregoing reasons, the judgment is affirmed. Appellant shall pay respondent her costs on appeal as well as $1,432.70 in sanctions pursuant to section 128, subdivision (a).

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Kline, P.J.

We concur:

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Lambden, J.

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Ruvolo, J.

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[6] Section 527.6 provides that a temporary restraining order or injunction relating to harassment "shall be issued on forms adopted by the Judicial Council of California and that have been approved by the Department of Justice . . . ." (§ 527.6, subd. (m).) Appellant's response to respondent's petition for an injunction prohibiting harassment was submitted on such a form. Paragraph 10 of the form invites the party against whom relief is sought to check a box if there are any "additional reasons" (beyond denial of the factual allegations of the petition or specified defenses) why an injunction should not be granted. Appellant checked the box and, in the space provided for him to specify the reasons, wrote in "see motion to dismiss." The motion to dismiss was not made part of appellant's appendix. Thus the record does not show whether the motion to dismiss was actually made or, if it was made, that it was based on the failure of respondent to post the necessary undertaking.